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Supreme Court of the United States

OCTOBER TERM, 1937.

No. 773-775

AETNA INSURANCE COMPANY,
Petitioner,

—against—

UNITED FRUIT COMPANY,
Respondent.

UNION MARINE & GENERAL INSURANCE COMPANY, LTD., formerly Union Marine Insurance Company, Ltd.,
Petitioner,

—against—

UNITED FRUIT COMPANY,
Respondent.

BOSTON INSURANCE COMPANY,
Petitioner,

—against—

UNITED FRUIT COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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Petition.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States.

The petition of Aetna Insurance Company, Union Marine and General Insurance Company and Boston Insurance Company, for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit, respectfully shows:

Statement of Matter Involved.

The petitioners are underwriters who insured the steamship "Almirante", and who paid the full amount insured under their policies when the vessel was sunk on September 6, 1918, in collision with the steamship "Hisko", owned and operated by the United States Government. The respondent was the owner of the "Almirante". These actions were brought by the petitioners in the United States District Court for the Southern District of New York, on the law side, to recover certain monies which the owner of the "Almirante" had recovered from the United States Government, as owner of the "Hisko", and which the plaintiff underwriters claim on the principle of subrogation.

The material facts are all admitted in the pleadings or stipulated by the parties, so that the cases involve a pure question of law.

For the purpose of this petition, the three cases will be treated as one. These cases are representative of a large number of similar claims, and the reason for bringing three suits was to present three typical situations depending on the form of receipt, if any, taken by the various insurance companies interested. In certain cases the respondent relied on the form of receipt taken, but as neither of the lower courts considered the receipts material, we need not discuss them here.

The defendant originally purchased the "Almirante" in 1914 for $400,000. In May, 1918, she was insured with various underwriters in the United States and England, including these plaintiffs, under policies of hull insurance in which she was valued at the sum of $632,610.

In addition to this hull insurance the owner obtained in London various "P. P. I."* or "honor" policies aggregating £65,105, against total loss only of the "Almirante". The interest insured in these policies is variously described as "increased value", "disbursements", etc., but the defendant's answers specifically state (in paragraph 10) that these policies were "upon the SS. 'Almirante' for increased valuation" (R., p. 13, fol. 39; p. 25, fol. 75; p. 37, fol. 111). These policies were stated to be without benefit of salvage; admittedly they were not legally enforceable, and payments under such policies gave rise to no rights of subrogation. English Marine Insurance Act of 1906, Sec. 4; *Edwards & Co.* v. *Motor Union Insurance Co.*, 1922, 2 K. B. 249 (R., pp. 46, 47; Exhibit 10, p. 96; see opinion of Circuit Court of Appeals, R. 164).

The respondent not only concedes but alleges that the foregoing insurances were placed "in accordance with the customary practice" (R., pp. 13, 25, 37, fols. 39, 75, 111).

After the "Almirante" was sunk in collision in 1918, the defendant collected a total loss from underwriters who insured the following sums:

American Hull Underwriters		$284,673.00
English Underwriters:		
Hull	£61,305.	
P. P. I.	65,105.	
	£126,410.	
(at exchange of $4.75-¾; R., p. 89, fol. 265)		601,395.57
Total		$886,068.57

* These letters stand for "policy proof of interest".

After a considerable lapse of time an Act of Congress was passed, permitting suit to be brought against the United States, as owner of the "Hisko". In that suit, which was not concluded until 1932, the defendant recovered for the loss of the "Almirante", including stores and sundries, $1,763,013.38* (Recovery Statement Exhibit 9, p. 42). The expenses of the litigation amounted to upwards of $300,000, but after deducting these expenses and adding a small item of bank interest there remained a net recovery of $1,463,997.09.

Accordingly, after collecting the judgment in the collision suit the defendant had in hand the following sums in respect of the loss of the "Almirante":

Collected from American Hull Underwriters		$284,673.00
From English Hull Underwriters	£61,305	
From English P. P. I. Underwriters	65,105	
	£126,410	601,395.57
Carried by respondent as self-insurer		50,609.00**
Net recovery in collision suit		1,463,997.09
Total		$2,400,674.66

* This includes an item of $1320.36, which it may be claimed was not covered by the policy, but that amount is too small to have any significance in this connection.

** As to this item (being the difference between the amount insured and the agreed value), the respondent was correctly treated just like any other hull underwriter (Recovery Statement, Exhibit 9, p. 44). See in this connection note on page 33 of petitioner's brief attached hereto.

All of the foregoing figures appear in the recovery statement issued by Johnson & Higgins, the defendant's brokers, under date of November 22, 1932, Exhibit 9, any part of which it was stipulated could be offered in evidence by either party as prima facie evidence of any of the facts stated therein (R., p. 62, fols. 186; p. 63, fol. 187; p. 77, fol. 229; p. 86, fol. 256). The figures are summarized in Exhibit 12, which is a recapitulation offered at the trial (R., pp. 51, 97).

Out of these funds the shipowner partially reimbursed its underwriters, as follows (Exh. 12, R., pp. 97-8):

Paid to American Hull Underwriters	$ 252,681.36
Allocated to respondent as self-insurer	44,921.54
Paid to English Hull Underwriters	184,197.35
Paid to English P. P. I. Underwriters	85,999.64
Retained by respondent	1,832,874.77
Total	$2,400,674.66

It will be noted that a substantial sum was paid to the P. P. I. underwriters, who admittedly had no legal right to any part of the fund. Owing to the fact that most of the P. P. I. insurance was written by the same English underwriters who insured the hull (R., p. 99, Exh. 13), and the remainder was largely written by companies which were affiliated with English hull underwriters by stock ownership (R., p. 56, fols. 167-8), this gratuitous payment to P. P. I. underwriters was, in effect, a payment to the English hull underwriters and, as a result, English hull underwriters obtained a much more favorable settlement than American hull underwriters. Indeed, in some

cases this disparity applied to different policies written by the same company. Some of the English companies wrote dollar policies at their American branches in New York, and sterling policies at their home offices in London (R., p. 53, fol. 159; p. 54, fol. 160). In these cases the English home office received a more favorable settlement than the American branch.

The final result was that the American hull underwriters have received back about 89% of what they had paid out fourteen years before. Although the net recovery from the "Hisko" was considerably more than twice the valuation fixed in the hull policies, the American hull underwriters did not even receive the full amount of their payments, to say nothing of interest for the fourteen years that had intervened. The sum retained by the respondent ($1,832,874.77, *supra,* p. 5) was nearly three times the valuation in the hull policies and about $70,000 in excess of the value of the vessel as fixed by the courts, even after the respondent had paid to the English P. P. I. underwriters a large sum (nearly $86,000) which was not legally due.

The Issue Presented.

The sole issue presented in the present litigation is the effect of a valuation clause in a marine insurance policy on a vessel. In *Gulf Refining Co.* v. *Atlantic Mutual Insurance Co.,* 279 U. S. 708, this Court had occasion to consider the effect of an agreed valuation in a marine policy. In that case, however, the policy was on cargo, and this Court pointed out the different effect which is given to a valuation clause in the cases of hull and cargo policies respectively. As explained in that opinion, the assured under a valued cargo policy is, in effect, a co-insurer in respect of any excess over the agreed valuation.

A shipowner, however, recovers his loss in full under a hull policy, without regard to the relation between the actual value and the agreed value; so that the element of coinsurance is wholly lacking under such policies. For that reason it has always been held, until the decision in the present case, that the valuation in a hull policy is conclusive for all purposes as between the parties. In the *Gulf Refining Co.* case this Court indicated that there might be some question about this rule as applied to general average cases; but any such doubt is removed in the present case by the express terms of the policies (see Petitioners' Brief, *infra*, p. 34). Under these policies it is clear that the actual value of the vessel does not enter into the computation of the loss in any way whatsoever, even in cases of salvage or general average.

Accordingly, these cases present squarely the question whether a valuation which is binding on the underwriters for all purposes is binding on the assured in the matter of apportioning recoveries from third parties. In *Mobile and Montgomery R. Co.* v. *Jurey*, 111 U. S. 584, at pages 594-5, this Court answered this question in the affirmative; and that rule has been uniformly applied in this country ever since.

It is the contention of the petitioners that, under the rule laid down by this Court in the *Jurey* case, they were entitled to full and complete reimbursement, including interest on their respective payments while they were deprived of the use of their funds. The petitioners contend that their right of reimbursement is a first charge on the recovery; and only after their claim has been satisfied can the owner participate in the fund recovered from a third party tort feasor.

Decision of the District Court.

The District Court held that

> "it has become the accepted rule that where the hull insurer has first paid the value agreed on in the policy and the owner later recovers a sum from a third person whose negligence caused or contributed to the loss, the insurer may recoup the net sum so recovered, up to the full amount of the payment under the policy" (R., p. 104-5, fols. 312-3).

The District Court specifically held that the present cases fell squarely within the decision of the Circuit Court of Appeals for the Second Circuit in the case of *The Livingstone,* 130 Fed. 746.

Following the rule as above stated, the District Court gave the plaintiffs judgment for the difference between the amounts they had respectively paid out in 1918 and the amounts they had received back in 1932, without interest.

Cross appeals were taken. The petitioners appealed because they had not been fully reimbursed in accordance with the decision in the *Livingstone* case. The respondent appealed on the ground that the petitioners were entitled to no recovery whatever.

Decision of the Circuit Court of Appeals.

The Circuit Court of Appeals reversed the decision of the District Court and dismissed the complaints, holding that the plaintiffs were not entitled to any recovery whatever. The following are some of the more important features of the opinion of the Circuit Court of Appeals:

It concedes that its decision in the present cases is contrary not only to English law but to its own

decision in *The Livingstone* (*supra*), more than thirty years ago, and to the earlier decision of Judge Addison Brown in *The St. Johns* (101 Fed. Rep. 469).

It suggests that the court did not intend to decide as it did in *The Livingstone,* but that its decision may have been the result of inadvertence.

It does not mention the language used by this Court in the *Jurey* case (quoted, *infra,* p. 14), although that language was quoted in full in the petitioners' brief in the Circuit Court of Appeals.

It declines to recognize the difference between hull and cargo policies pointed out by this Court in the *Gulf Refining Company* case (*supra,* p. 6).

It permits an assured to make a profit out of his loss by refusing to underwriters the full reimbursement to which they are entitled under their right of subrogation.

It concedes that it should not lightly overrule a long-established usage, but finds that there is no such usage on the question involved here. This finding is contrary to the finding of the District Court (R., pp. 104-105, fols. 312-3) and contrary to the record, and is apparently based on the fact that the shipowner's brokers distributed the money as they did (R., p. 168).

A remarkable feature of the opinion below is its frank expression of inability to understand why Judge Brown's decision in *The St. Johns* (101 Fed. Rep. 469) was cited in *The Livingstone* opinion, in view of the fact that

> "its reasoning was necessarily overruled, and although unquestionably it has the great authority of the judge who decided it, we cannot regard it as unimpaired" (R., p. 168).

In *The Livingstone,* the court did not merely cite *The St. Johns,* but referred specifically to certain

pages of the opinion in that case. An examination of those pages discloses that, far from overruling Judge Brown's reasoning, *The Livingstone* adopted his reasoning in its entirety. The lower court's misunderstanding of *The Livingstone* and *The St. Johns* is readily demonstrable from its opinion, and appears to have been a controlling factor in its decision.

State of the Authorities Before the Present Decision.

In 1870 the Court of Queens Bench decided the case of *North of England Insurance Association* v. *Armstrong* (1870), L. R. 5 Q. B. 244. In that case a vessel was insured for £6,000 and valued at that sum, although actually worth £9,000. She was sunk in a collision and the underwriters paid a total loss. Thereafter the owners recovered £5,000 from the owners of the colliding vessel, who were able to limit their liability to that sum. It was held that the underwriters were entitled to the entire recovery. The rule applied in that case has ever since been accepted as settled law in England, and has been part of the statutory law of England since 1906.

> *Thames & Mersey Marine Insurance Co., Ltd., The* v. *British & Chilian Steamship Co.* (1915), 2 K. B. 214;
> *Goole & Hull Steam Towing Co.* v. *Ocean Marine Ins. Co.* (1928), 1 K. B. 589, 593;
> (English) Marine Insurance Act of 1906, Section 79 (1).*

As this Court has pointed out, the English Marine Insurance Act is a codification of the common law. *Standard Marine Insurance Company* v. *Scottish*

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* 6 Edw. 7, c. 41. *A copy of this Act appears as an appendix to all of the recent editions of Arnould on Marine Insurance and Average, and we cite that appendix to the Court for convenience of reference.*

Metropolitan Assurance Company, Ltd., 283 U. S. 284, at page 289.

By way of dictum the court which decided the *Armstrong* case said that the underwriters would have been entitled to the entire recovery even if it had exceeded the amount of their payment. This dictum has been criticized by some of the English courts, but the question to which it refers has never arisen in England.

In 1884 this Court decided the case of *Mobile & Montgomery Railway Co.* v. *Jurey, et al., supra,* in which it cited the *Armstrong* case with approval.

In 1900 Judge Addison Brown, in the United States District Court for the Southern District of New York, decided the case of *The St. Johns,* 101 Fed. Rep. 469, which presented precisely the same question which had been decided in the *Armstrong* case. Judge Brown decided that the valuation in the policy was conclusive and that the underwriters were entitled to the entire recovery, which was less than the amount they had paid under their policies. He cited the *Armstrong* case, and said:

> "The decision in that case has been repeatedly cited by the supreme court with apparent approval and to some extent followed. *The Potomac,* 105 U. S. 630, 634, 26 L. Ed. 1194; *Railway Co.* v. *Jurey,* 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527" (101 Fed. Rep. at p. 476).

With characteristic foresight and caution, however, Judge Brown made it clear that he was adopting only the decision and not the dictum in the *Armstrong* case. He said (101 Fed. Rep. at pp. 474-5):

> "If the amount recoverable from the wrongdoer, after payment of the damage-claims of

> third parties, were in excess of the amount paid by underwriters to the assured, no doubt that excess would belong to the latter; since the insurers' right of subrogation in equity could not extend beyond recoupment or indemnity for the actual payments to the assured."

In 1904 the Circuit Court of Appeals for the Second Circuit decided the case of *The Livingstone* (130 Fed. Rep. 746; certiorari denied 194 U. S. 637) which presented the precise state of facts mentioned in the dictum in the *Armstrong* case, *i. e.,* the recovery was greater than the amount which the underwriters had paid under their policy. The District Court had followed the dictum in the *Armstrong* case and given the underwriters the entire recovery. The Circuit Court of Appeals reversed this decision and held that the underwriters were entitled to full and complete reimbursement before the assured could receive any share of the recovery; but that when the underwriters had been fully reimbursed (*i. e.,* had received the amount of their respective payments with interest), the excess belonged to the assured. In reaching this result the Circuit Court of Appeals followed exactly the reasoning of Judge Addison Brown in *The St. Johns,* notwithstanding its statement in the present case that the reasoning of *The St. Johns* "was necessarily overruled" in *The Livingstone.* In the latter case (at p. 749) the citation of *The St. Johns* refers specifically to pages 474 and 475; and the passage last above quoted from *The St. Johns* begins on page 474 and ends on page 475. This is convincing evidence that the Circuit Court of Appeals followed instead of overruling Judge Brown's reasoning. Even more positive evidence appears, however, from the respective opinions:

Judge Brown said that the rights of the underwriters are limited, because

> "the insurers' right of subrogation in equity could not extend beyond recoupment or indemnity for the actual payments to the assured" (101 Fed. Rep. at p. 475).

The Circuit Court of Appeals said:

> "The doctrine of subrogation has its origin in equity, its purpose is indemnity and its object is attained when the insurer has been fully compensated" (130 Fed. Rep. at p. 749).

It is plain, therefore, that the lower court erred in its statement that *The Livingstone* decision had overruled the reasoning of Judge Brown in *The St. Johns*. The court was equally mistaken in its statement that

> "the mid ground which the plaintiffs suggest—that the underwriters should be merely preferred to the owner—has no warrant in law. Unless his right of subrogation gives him recovery *in toto*, he must let in the owner as co-insurer, as in other similar situations" (R., p. 167).

The position of the plaintiffs did have "warrant in law" to the extent of a very carefully considered opinion by Judge Addison Brown, and a decision to precisely the same effect by the Circuit Court of Appeals for the Second Circuit, both of which have stood unchallenged for more than thirty years. The rule very clearly laid down in those cases was that a hull underwriter who has paid a total loss under a valued policy is entitled to full reimbursement out of any recovery from third party tort feasors; but that as the doctrine of subrogation is an equitable doctrine, it cannot be pursued to the point of giving the underwriter a profit out of the transaction.

The rule laid down in the *Livingstone* decision by the Circuit Court of Appeals for the Second Circuit, has been adopted in the Sixth and Ninth Circuits and is still law in those Circuits. *Brown* v. *Merchants Marine Insurance Company,* 152 Fed. Rep. 411; *Federal Insurance Company* v. *Detroit Fire & Marine Insurance Company,* 202 Fed. Rep. 648. In the *Brown* case the vessel was valued at $75,000 and was actually worth $140,000, but the owner did not share in the recovery. The *Livingstone* was cited with approval. In the *Federal Insurance Company* case, both the *Livingstone* and the *St. Johns* were cited, and it appears that the rule of the *St. Johns* was definitely approved and adopted.

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRITS:

(1) The rule of the *Livingstone* has been adopted in at least two other Circuits, and the overruling of that case by the court which decided it creates a direct conflict in the law, as administered in the different Circuits, on the question what effect is to be given to the valuation in a policy of hull insurance.

Brown v. *Merchants Marine Insurance Company,* 152 Fed. Rep. 411;

Federal Insurance Company v. *Detroit Fire & Marine Insurance Company,* 202 Fed. Rep. 648.

(2) The decision of the Circuit Court of Appeals is directly contrary to a rule of law stated by this Court more than fifty years ago in the case of *Mobile and Montgomery R. Co.* v. *Jurey,* 111 U. S. 584. In that case (at pp. 594-5) this Court said:

"Insurers of a ship which has been run down

> and sunk by the fault of another ship, are, upon their payment of a total loss, subrogated to the right of the insured to recover therefor against the owners of the latter vessel, and if their policy was a valued one, their payment of this value will give them the whole *spes recuperandi,* and the right to the whole damages, though the insured vessel was, in fact, worth a larger sum than the valuation named in the policy. *North of England Ins. Association* v. *Armstrong,* L. R. 5 Q. B. 244. See, also, *Clark* v. *Wilson,* 103 Mass. 219, 227."

As pointed out above (*supra,* p. 11) this language was relied on by Judge Brown in deciding the case of the *St. Johns;* and Judge Brown's decision in the *St. Johns* was in turn relied upon by the Circuit Court of Appeals for the Second Circuit in deciding the *Livingstone.*

(3) The decision of the Circuit Court of Appeals overrules the decision of Judge Addison Brown in *The St. Johns* case, *supra,* where he followed the *Armstrong* case in reliance, to a considerable extent, on the approval of that case by this Court.

The decision of the Circuit Court of Appeals also overrules its own decision in *The Livingstone* which was, in turn, based upon the decision of Judge Addison Brown in *The St. Johns.*

In treating the respondent as a "coinsurer" in respect of the excess of actual value over agreed value, the Circuit Court of Appeals declines to recognize the well-established distinction between hull and cargo policies which this Court pointed out in *Gulf Refining Co.* v. *Atlantic Mutual Ins. Co.,* 279 U. S. 708, at page 713. In that case this Court twice referred to the case

of *International Navigation Co.* v. *Atlantic Mutual Insurance Company,* 100 Fed. Rep. 304, where (at pp. 317 to 326) Judge Addison Brown demonstrated that in a cargo policy the *insured* value does not affect the amount of the loss payable; whereas in a hull policy the *actual* value does not affect the amount of the loss payable. The *International Navigation Co.* case was affirmed on the opinion below, 108 Fed. Rep. 987; and certiorari was denied, 181 U. S. 623. See also *International Nav. Co.* v. *Sea Ins. Co. Ld.,* 124 Fed. Rep. 93; affirmed, 129 Fed. Rep. 13.

(4) Beginning with the *Armstrong* case and coming on down through *The Livingstone,* there is an unbroken line of authorities in the United States and England covering a period of nearly seventy years, all of which support the claim of plaintiffs to full reimbursement in the present case. We submit that a doctrine so long and so unanimously applied should not now be changed, and certainly should not be overruled by a court which (as clearly appears from its opinion) misinterpreted the reasoning of the earlier decisions.

(5) For many years shipowners and their underwriters have believed the law to be well settled in accordance with the decision in the *Armstrong* case, and the statement of this Court in the *Jurey* case. When later the great authority of Judge Addison Brown was supplemented by the decision of the Circuit Court of Appeals for the Second Circuit in *The Livingstone,* and certiorari was denied by this Court (194 U. S. 637), it was thought that the question was no longer open. The customary methods of writing hull insurance both here and in England, are based upon the law as laid down in the decisions above mentioned (see Petitioners' Brief, *infra,* pp. 29-36).

We submit that a rule which has been so long in force and so generally accepted, should be changed, if at all, only by legislative action which would not disturb rights already vested.

(6) In the interest of economy shipowners take out certain basic insurance, referred to as hull insurance, on a low valuation; and take out certain supplemental insurance against total loss only, commonly referred to as "disbursements" or "P. P. I." insurance, for which a much lower premium is charged. This latter insurance is without benefit of salvage. The two sets of policies are so drawn as to give the assured complete protection at much less cost than he would incur if he covered the full value of his vessel with the ordinary form of hull insurance (Petitioners' Brief, *infra,* p. 34). The only advantage which the low valuation gives to the hull underwriter is taken from him by the decision below,—*i. e.* the improved prospect of obtaining full reimbursement from third party tort feasors. The waiver by the "disbursements" or "P. P. I." underwriters of their right to salvage was obviously intended to protect the hull underwriter in the rights secured to him under the *Armstrong* decision and the ruling of this Court in the *Jurey* case. Under the decision of the Circuit Court of Appeals, however, the assured is allowed to make a profit out of his loss by denying to underwriters their right of full subrogation. The court below recognized this difficulty created by its decision, but said that where this situation arises "the owner has merely had a windfall, owing to the peculiar nature of the 'P. P. I.' policies". This means that a method of conducting business which has been carefully planned in the light of established principles of law, and which produces just and sensible results when those principles are

applied, has been changed into a series of gambling transactions by the lower court's refusal to apply well-settled law.

(7) The importance of the decision below is not limited to occasional cases which present extraordinary values or other abnormal features. It is true that cases rarely arise which present the situation discussed in the *dictum* in the *Armstrong* case; but cases arise constantly which involve the actual *decision* in that case. In the typical collision case the actual net recovery is almost invariably less than the amount paid by the hull underwriters, and they receive this recovery in partial reimbursement of their loss. Under the decision below it would appear that this long-settled practice will be changed, and the assured will participate in the recovery as a co-insurer, in respect of the difference between the insured value and the actual value, even though he has recovered this difference from P. P. I. underwriters. To minimize the obvious injustice of this result, the court makes the novel suggestion that the rights of hull underwriters may depend on the amount of P. P. I. insurance which the assured chooses to take out,—*i. e.*, on transactions with which the hull underwriters have absolutely nothing to do. This problem will arise in practically every collision case where there is a recovery in respect of hull damage.

(8) This Court has pointed out the desirability of keeping the law of marine insurance uniform in England and the United States.

> *Queen Insurance Co.* v. *Globe & Rutgers Fire Insurance Co.*, 263 U. S. 487, 493.

The present is a particularly strong case for the application of this principle, since under the decision

below a different rule is applicable to identical policies covering the same vessel, where they are issued by different offices of the same company. We do not suggest that American law should be changed to conform to English law, but we do submit that where the law of the United States and England has been the same for more than a generation, our courts should not change that law in the United States excepting for reasons of the gravest importance. In this connection we refer to a case decided fifty years ago by the House of Lords, which is still one of the leading cases on the construction of marine insurance policies, and we quote as follows from the opinion of Lord Herschell in that case:

> "I think it will be found, upon examination of the authorities, that the general words in a marine policy have received from the courts, for a long series of years, a construction to which your Lordships would do well to adhere. The instrument is one in daily use, and if your Lordships were to put a new construction upon it you would be likely to defeat, and not to give effect to, the intention of the parties. *Nothing would be more dangerous, in my opinion, than to depart from a construction which the authorities have put upon words in common use in a mercantile instrument, even if the propriety of the decision might originally have been open to question.*" (Italics ours.)
>
> *Thames & Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.*, 12 A. C. 484, at page 494.

WHEREFORE, your petitioners respectfully pray that this Court issue writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit, directing it to send to this Court for review, a full and complete transcript of the record and all

proceedings of the cases entitled on its docket: No. L57-271 Aetna Insurance Company, Plaintiff-Appellant-Appellee, against United Fruit Company, Defendant-Appellee-Appellant; No. L57-272 Union Marine and General Insurance Company, Limited, formerly Union Marine Insurance Company, Ltd., Plaintiff-Appellant-Appellee, against the same; and No. L57-273 Boston Insurance Company, Plaintiff-Appellant-Appellee, against the same; and that the said decrees of the United States Circuit Court of Appeals for the Second Circuit be reversed by this Honorable Court; and that your petitioners may have such other and further relief in the premises as to this Court may seem meet and just; and your petitioners will ever pray.

Dated, New York, February 7, 1938.

AETNA INSURANCE COMPANY,
UNION MARINE AND GENERAL INSURANCE COMPANY, LTD.,
BOSTON INSURANCE COMPANY,
Petitioners,

By D. ROGER ENGLAR,
T. CATESBY JONES,
OSCAR R. HOUSTON,
MARTIN DETELS,
Attorneys for Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1937.

No.————

AETNA INSURANCE COMPANY,

Petitioner,

—against—

UNITED FRUIT COMPANY,

Respondent.

UNION MARINE & GENERAL INSURANCE COMPANY, LTD., formerly Union Marine Insurance Company, Ltd.,

Petitioner,

—against—

UNITED FRUIT COMPANY,

Respondent.

BOSTON INSURANCE COMPANY,

Petitioner,

—against—

UNITED FRUIT COMPANY,

Respondent.

BRIEF FOR PETITIONERS.

Opinions Below.

The opinion of the United States District Court for the Southern District of New York appears at pages 100-108 of the record, and is reported in 18 F. Supp. at page 441. The opinion of the Circuit Court of Appeals for the Second Circuit appears at pages 163-169 of the record, and is reported in 92 F. (2d) at page 576.

Jurisdiction of This Court.

The jurisdiction of this Court is under Section 240 of the Judicial Code as amended by the Act of February 13, 1925, U. S. Code, Title 28, Section 347, and under Article 3, Section 2, Clause 1 of the Constitution of the United States. The decrees of the Circuit Court of Appeals were entered November 15, 1937.

The Facts.

The facts have been fully stated in the petition and will not be repeated here. We shall, however, as a part of our argument, refer to the record in support of some of the statements of fact made in the petition.

I.

The rule applied in the *Livingstone* is still law in the Sixth and Ninth Circuits and the decision below creates a conflict between the law of those circuits and the law of the Second Circuit.

In *Brown* v. *Merchants Marine Insurance Company*, 152 Fed. Rep. 411, the Steamship "City of Kingston" was insured under policies in which she was valued at $75,000. She was sunk in a collision, for which both vessels were held at fault. In the litigation which grew out of the collision, the "City of Kingston" was found to be worth $140,000. There was an actual net recovery of $47,426.97. A controversy arose between different sets of underwriters, which it is unnecessary to discuss here.* For the purposes of the present case

* In the *Brown* case, apparently the P. P. I. policies did not contain any waiver of salvage.

the important point is that the total amount of insurance on the "City of Kingston" was only about half of her actual value. Nevertheless no part of the recovery was claimed by or paid to the owners. The *Livingstone* was cited and followed. We submit that this case is still good law in the Ninth Circuit where it was decided.

In *Federal Insurance Company* v. *Detroit Fire & Marine Insurance Company,* 202 Fed. Rep. 648, the court had to determine the rights of hull underwriters in respect of funds recovered from another vessel with which the insured vessel was in collision. Owing to the fact that both vessels were at fault the amount recovered was less than the insured value. After citing the *Livingstone* and other authorities the Circuit Court of Appeals for the Sixth Circuit said at page 653:

> "The amount sued for was in excess of the total insurance paid; but, since the damages resulting from the collision were divided, the total recovery on account of the loss of the Etruria was materially less than her agreed valuation for insurance. So far as the libel is applicable to the amount recovered, the suit was wholly of a representative character, and the owner of the Etruria, the Transit Company, was, under well-settled principles, trustee for the beneficiaries of such recovery. *United States* v. *American Tobacco Co.,* 166 U. S. 468, 474, 17 Sup. Ct. 619, 41 L. Ed. 1081; *Fairgrieve* v. *Marine Ins. Co.,* 94 Fed. 686, 688, 37 C. C. A. 190 (C. C. A. 8th Cir.); *The St. Johns* (D. C.) 101 Fed. 469, 473, and decisions there cited; Arnould on Marine Ins. §1226, at page 1388."

We call particular attention to the citation of Judge Brown's decision in the *St. Johns,* and we submit that the rule of the *St. Johns* (later adopted in the *Livingstone*) is still good law in the Sixth Circuit.

II.

The decision below is contrary to a rule of law established by this court more than fifty years ago.

In *The Potomac,* 105 U. S. 630, at page 635, this Court referred to the valuation in a hull policy and said:

> "And that valuation is conclusive in respect of all rights and obligations arising upon the policy of insurance. *North of England Insurance Association* v. *Armstrong,* Law Rep. 5 Q. B. 244."

We have already quoted the language used by this Court in *Mobile and Montgomery R. Co.* v. *Jurey,* 111 U. S. 584, at pages 594-5, where the *Armstrong* case was cited and approved (*supra,* p. 14).

We submit that the approval of the *Armstrong* case in the *Potomac* case and the *Jurey* case was more than mere dictum. While these cases presented different facts, the principle of the *Armstrong* case was relevant and was relied upon in reaching the decisions. Certainly this was the view taken by Judge Addison Brown, when he said of the *Armstrong* case:

> "The decision in that case has been repeatedly cited by the supreme court with apparent approval and to some extent followed. *The Potomac,* 105 U. S. 630, 634, 26 L. Ed. 1194; *Railway Co.* v. *Jurey,* 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527" (101 Fed. Rep, at p. 476).

The court below does not even mention the *Jurey* case, and its only comment on *The Potomac* is as follows:

> "It is scarcely necessary more than to allude to the kind of approval supposed to have been

given to *North of England Association* v. *Armstrong, supra* (L. R. 5 Q. B. 244), in the *Potomac*, 105 U. S. 630, 635" (R., p. 168).

III.

The decision below clearly overrules the decision of the same court in the case of *The Livingstone*, 130 Fed. Rep. 746.

The facts in the case of *The Livingstone* were as follows:

The Steamship "Grand Traverse" was sunk and became a total loss as the result of a collision with the Steamship "Livingstone". In a suit brought by the owners of the "Grand Traverse" against the "Livingstone", the latter vessel was held solely at fault and the owners of the sunken vessel recovered her full value, which was fixed at $37,500. The "Grand Traverse" was insured for $25,000 under policies in which she was valued at that amount. The leading underwriters on the "Grand Traverse" also insured the liability of the "Livingstone", and the proceedings against the latter vessel were brought over their active opposition. When, however, the liability of the "Livingstone" was established, the underwriters on the "Grand Traverse", who had paid a total loss in the sum of $25,000, intervened and claimed the entire amount of the recovery, less the expenses of litigation. The matter came on to be heard in the United States District Court for the Western District of New York. *The Livingstone*, 122 Fed. Rep. 278. After a careful review of the authorities, Judge Hazel held that the valuation in the policies on the "Grand Traverse" was conclusive as between the parties, and that the underwriters were entitled to the entire net recovery, even

though it exceeded the amount which they had paid. In the course of his opinion (at p. 284) he said:

> "I do not regard myself at liberty to depart from an established principle which, to use the language of Judge Brown in *International Navigation Company* v. *Atlantic Mutual Insurance Co.* (D. C.) 100 Fed. 314, is 'so long established as may well be deemed to enter into the contract as the understanding of the parties to it'."

The case was appealed to the Circuit Court of Appeals for the Second Circuit, where Judge Hazel's decision was modified, and it was held that the underwriters were only entitled to repayment of the amounts which they had severally paid under their policies, together with interest thereon; and that whatever balance of the net recovery remained after underwriters had been thus reimbursed, belonged to the assured.

In stating its decision, the Circuit Court of Appeals said that the underwriters were to be

> "completely indemnified for the loss sustained by them in paying the insurance";

and affirmed their right to

> "full and complete reimbursement for all losses and expenditures made by them incident to the insurance".

If there could be any doubt as to the meaning of this language, it is set at rest by the concluding paragraph of the opinion, which reads as follows:

> "The decree is reversed with costs of this appeal and the case is remanded to the District Court with instructions to enter a decree awarding the appellees *interest on the sums paid by them during*

the time they were deprived of the use of said sums, and awarding the balance of the fund in court, *after paying court fees and charges,* to the libellants." (Italics ours.)

In other words, the Circuit Court of Appeals ordered that the expenses of the litigation, including attorneys' fees, be deducted from the fund; that the underwriters then receive the amount of their payments, with interest for the period during which they were deprived of the use of the money; and that the remainder be paid over to the assured.

The decision resulted in a full recovery by underwriters, with interest, while the owners received only a small recovery in respect of their uninsured interest in the vessel. This circumstance was called to the court's attention on a motion for a reargument and the point was emphasized by copious references to the pleadings, the assignments of error and the mandate of the Circuit Court of Appeals. The motion for a rehearing was denied. We shall not burden this Court with citations from the record in connection with this motion for a rehearing, since the opinion below admits that the decision in the *Livingstone* did actually produce the effects claimed by these petitioners. The only ground on which it is sought to distinguish that case is, apparently, that it was inadvertently decided. We submit that the language above quoted from the opinion definitely negatives that ground of distinction. We further submit that the lower court's attempt to distinguish the *Livingstone* decision is nullified by its obvious misunderstanding of the reasoning on which that decision was based.

In *The Livingstone* case, the Circuit Court of Appeals merely recognized the binding effect of the valuation clause in the policy. The effect of that clause

had been pointed out by Judge Addison Brown in the case of *International Navigation Co.* v. *Atlantic Mutual Insurance Co.,* 100 Fed. 304, at page 323. In applying the clause against the underwriters, he said:

> "In all the cases here considered, the thing insured is the whole vessel, not simply a distinct aliquot part of it. What is valued in these policies, is not a certain fraction of the vessel, as of a part owner, but the whole vessel, and the entire quantum of the interest of the libelant, which owned the whole of it. The insurers are, therefore, estopped from claiming that, as respects the ship, any other or larger interest than that which they valued and insured, was benefited by the salvage service."

The estoppel to which Judge Brown referred, applies equally against the owners of the vessel, and was so applied by Judge Brown in the case of *The St. Johns,* 101 Fed. 469. We quote from the opinion in that case, as follows, at pages 474-6:

> "But I know of no principle of law or equity, by which the owner upon a settlement under a valued policy can be heard to allege a larger valuation of the ship uncovered by insurance, for the purpose of letting him in as constructive insurer, so as thereby to share in another remedy for the same loss to the insurer's prejudice. If the owner makes any claim upon the insurer under the policy, he must abide by its terms. The valuation stated in the policy is a part of the basis of the contract. It is a very material condition affecting in various ways the rights and liabilities of both parties. * * * * * * * * * * * *
>
> The right of the owner to be treated as constructive insurer of any uninsured excess of value above that stated in the policy, was involved in the

recent case in this court of *International Nav. Co.* v. *Atlantic Mut. Ins. Co.* (D. C.), 100 Fed. 304, although the interests were there reversed.

* * * * * * *

Amid some conflicting decisions, it was there considered that the sounder opinion at the present day is, that as respects all matters affecting the measure of compensation or the rights of either party growing out of the insurance contract, the valuation fixed by the policy operates as an estoppel upon both parties alike. *There the estoppel was in favor of the assured, here it operates to the advantage of the insurer; but the same rule is applied to both.*" (Italics ours.)

We have already referred to Judge Brown's prophetic statement of the limitation on the rights of underwriters, which was later adopted by the Circuit Court of Appeals in the case of *The Livingstone* (*supra*, p. 11). The authority of the *St. Johns* case has never been questioned until the decision of the Circuit Court of Appeals in the present litigation. Its authority is now denied on the theory that it was overruled in the case of *The Livingstone;* whereas in fact it was the principal basis of the decision in that case.

IV.

Methods of conducting the business of hull insurance both in the United States and abroad have been adjusted carefully to the long line of decisions overruled by the decision of the lower court in this case.

After discussing the American and English decisions which are mentioned in the petition, the Circuit Court of Appeals said:

"All this does not in our opinion make up such a uniform body of authority that we must assume the doctrine as an implied term in American hull policies. Besides, although we are not

> advised of the circumstances in which the 'recovery statement' was made, we do know that it was prepared by persons especially versed in such questions, and they at any rate followed the orthodox rule."

We are unable to give the foregoing passage any interpretation excepting that the court accepted the action of the shipowner's brokers as conclusive evidence of the prevailing practice in similar cases. The court had previously said that, after the judgment was paid, the respondent—

> "engaged the well known marine insurance agents, Johnson & Higgins, who prepared a 'recovery statement' * * *."

It would seem from the foregoing passage that the Circuit Court of Appeals were under the impression that Messrs. Johnson & Higgins were first called into this matter in a quasi-judicial capacity. It is the fact (and it appears from the third sheet of Exhibit 7, opposite p. 92) that Johnson & Higgins were the brokers who placed the insurance for the respondent in the first instance. The fact that they gave the underwriters the barest minimum which could even plausibly be defended, and gave the lion's share of the recovery to their employers, is nothing to their discredit; but there is not the slightest basis in fact for treating their distribution as an impartial or judicial determination. It is stipulated that these petitioners have not admitted its correctness (R., pp. 62-3, fols. 186-7; p. 77, fol. 229; p. 86, fol. 256).

That Johnson & Higgins did not distribute the recovery according to any definite principle, clearly appears from their own statement on page 4 of Exhibit 9 (the lithographed recovery statement which is filed with the Record). For the convenience of the Court we attach hereto, as Appendix A, a copy of the last

paragraph on the page above mentioned, relating to certain negotiations between the owners and the English hull underwriters, in which Johnson & Higgins acted as intermediary. The last sentence is as follows:

> "All the points raised by the English Underwriters were thereby resolved to the mutual satisfaction of themselves and the Owners."

This clearly shows that the settlement with the English underwriters was arrived at by negotiation, and not by the application of the "orthodox rule" to which the lower court refers.

The American underwriters were not parties to the negotiations or the settlement mentioned above (R., pp. 62-3, fols. 186-7; p. 77, fol. 229; p. 79, fol. 237; p. 86, fol. 256; p. 88, fol. 264). We attach hereto, marked Appendix B, an analysis of the payments made to English and American underwriters respectively, from which it appears that the respondent and its brokers adopted a much less generous attitude toward the American companies than toward the British companies.

In the light of the foregoing facts it is clearly apparent that the distribution of the recovery in this case was not made according to any definite rule, but was the subject of negotiations designed to adjust the matter on a basis favorable to the respondent.

The District Court, which based its decision on the earlier authorities and on the record in this case, found that the rule of the *Armstrong* case has become "the accepted rule". We submit that this conclusion is unavoidable when the record is carefully examined.

At the outset we call attention to the following paragraph in respondents' answers:

> "In addition to the policies of insurance referred to in Paragraph 3 of the complaint, the

> defendant also, in accordance with the customary practice, procured other policies of insurance upon the S. S. 'Almirante' for increased valuation in the sum of £65,105, which additional insurance covered only against total and/or constructive total loss and was permitted by the terms of the hull policies" (R., p. 13, fol. 39; p. 25, fol. 75; p. 37, fol. 111).

The foregoing allegations establish two facts which are significant in this connection.

First, the practice followed in this case was customary.

Second, the £65,105 of additional insurance was placed "upon the S. S. 'Almirante' for increased valuation". We mention this to forestall any suggestion that this insurance was not actually on the value of the vessel, but upon some other interest.

We next turn to the two sets of policies themselves and find that the hull policies (Exhibits 6, 7, 8 at pp. 91, 93, 95) contain the following provision:

> "In ascertaining whether the Vessel is a constructive total loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account."

Under this provision it is clear that if the damage to the vessel equals or exceeds the insured value, the owner may abandon to his underwriters and claim a constructive total loss. Phillips on Insurance, 5th Edition, Vol. 2, Secs. 1519, 1532; Arnould on Marine Insurance and Average, 11th Edition, Vol. 2, Secs. 1132, 1134.

The P. P. I. insurance, which is stated to be on "Disbursements" etc., contains the same clause above quoted with respect to constructive total loss, and also the following very important provision:

> "To follow Hull Underwriters in the event of total or constructive or compromised total loss" (last sentence of paragraph 3 of the second sheet of Exhibits 1, 2 and 4 Annexed to Exhibit 1, R., pp. 65, 67, 71).

Considering the two sets of policies together, it is apparent that the assured is fully protected up to the aggregate of his insurance. All damage claims and other partial loss claims are payable in full under the hull policies up to the amount insured.* If such claims exceed the valuation in the hull policies, then the assured may abandon and collect as for a constructive total loss under the hull policies; and this collection automatically entitles him to collect a total loss under the P. P. I. policies, which are against total loss only but agree to "follow Hull Underwriters".

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* Up to the limit of the amount insured, each policy pays such proportion of the loss as the amount insured bears to the insured value; or (expressing the same result in another way) such proportion of the amount insured as the loss bears to the policy value. *International Nav. Co.* v. *Atlantic Mut. Ins. Co.*, 100 Fed. 304, at page 321. In the present case the respondent carried as coinsurer a line of $50,609; that is to say, the amount insured was this much less than the insured value. As to this sum, the respondent is clearly and admittedly entitled to be treated just like any other hull underwriter; and it was so treated by its brokers in the recovery statement (Exhibit 9, p. 44). The lower court apparently confused this recognized and admitted coinsurance (which applies to a part of the agreed value) with a wholly different form of coinsurance which has no existence under a hull policy, *i. e.*, coinsurance in respect of an actual value in excess of the agreed value.

To remove the possible doubt as to the effect of the valuation in cases of salvage and general average,—a doubt to which this Court referred in the case of *Gulf Refining Company* v. *Atlantic Mutual Insurance Company,* 279 U. S. 708, at pages 713-4, the hull insurance policies issued by these petitioners contain the following clause:

> "This insurance is fully to indemnify the assured for any and all charges and expenses applicable to the vessel in respect of the perils insured hereunder, irrespective of the value of the vessel, and this policy shall pay its share of such charges and expenses in the proportion which the amount hereby insured bears to the value as declared herein" (second sheet of Exhibits 6, 7, 8, R. 91, 93, 95).

Under this clause it is clear that the actual value of the vessel can never affect the settlement of a loss under the hull policies.

Another significant fact is that the P. P. I. policies specifically provide that "this insurance is without benefit of salvage" (second sheet of Exhibits 1, 2, 4 Annexed to Exhibit 1, R., pp. 65, 67, 71). The reason and the necessity for this provision are obvious. Under the rule in the *Armstrong* case the hull underwriters are preferred both in respect of any value realized from the wreck and in respect of recoveries from third parties. Accordingly, if the P. P. I. Underwriters were entitled to participate in salvage, this right would conflict with the established rights of hull underwriters.

A comparison of the two sets of policies discloses that the P. P. I. policies are written for a much lower premium than the hull policies. The P. P. I. Underwriters can afford to take a lower premium because

they insure against total loss only. For the same reason they can afford to waive salvage. The hull underwriters, on the other hand, pay all partial losses, which constitute by far the greater part of losses paid.* In consideration of their accepting this burden, the hull underwriters get a larger premium and have a preferred position in respect of the proceeds of the wreck and recoveries from third parties.

We submit that no one who carefully considers the method of insuring this vessel (which is admitted to be the customary method) can escape the conclusion that this method was carefully devised in the light of the long line of decisions beginning with the *Armstrong* case.

The Circuit Court of Appeals apparently dismisses the facts above pointed out as a mere series of coincidences, and assumes that "owing to the peculiar nature of the 'P. P. I.' policies" their proceeds may be treated by the owner as a mere "windfall". With all respect, we submit that the owner has a windfall not because of any peculiarity of P. P. I. policies but solely because the lower court declined to follow a long line of authorities in the light of which those policies were formulated. The Circuit Court of Appeals suggests that the obvious difficulties created by its rejection of a long established practice may be minimized by a new method of apportionment under which the rights of hull underwriters would depend on the question whether and to what extent the shipowner had taken out P. P. I. insurance, which, it is said, should "be brought into hotchpot" (R., p. 166). This suggestion is wholly novel and is not claimed to have any support either in law or usage. It is not

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* *The case of Pitman v. Universal Marine Co., mentioned by the Circuit Court of Appeals, is not an exception to this rule, but merely illustrates the point that the assured cannot recover more than his actual loss.*

clear just how this novel method of apportionment is to be applied, but it is significant that in the present case it did not prevent the respondent from realizing a large profit while its underwriters received substantially less than the amount of their payments.

In order that the fundamental question involved in this litigation may not be obscured by the unusual facts upon which it arises, we call attention to the fact that the basic policy form issued by the hull underwriters contained a warranty restricting the amount of "disbursements" insurance which could be taken out; but this restriction was expressly waived by a clause in the printed endorsement attached to the hull policies.* This waiver was obviously intended to permit the owners to protect themselves in the situation created by the great rise in hull values due to war conditions.

In considering the matter on principle, it must be borne in mind that the hull policies ordinarily limit the amount of P. P. I. insurance which can be placed, thereby forcing the assured to increase the amount of his hull insurance, which requires a corresponding increase in the agreed valuation in the hull policies. Thus, in the ordinary case, the aggregate of the hull policies (and the valuation in those policies) is only slightly less than the actual value of the vessel, leaving only a small sum to be covered by P. P. I. policies in which the right of subrogation is waived. It is for this reason that the net recovery from third parties, after the deduction of all expenses, rarely equals and still more rarely exceeds the amount paid by the hull underwriters.

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* "It is agreed that the owners and/or managers are at liberty to insure Disbursements and/or other interests to any amount at their own absolute discretion: and the Underwriters hereby waive disclosure of the amounts so insured" (R. 91, 93, 95).

V.

The decision below is not based on any principle of justice or equity.

In the courts below the principal argument for the defendant was based on the general contention that there was some injustice or lack of equity in the position of the plaintiffs. In answer to this argument, we desire to point out that general principles of equity can have very little application to a purely arbitrary and artificial arrangement. Where, as here, such arrangements are deliberately entered into by persons skilled in a particular business, they are designed to produce and commonly do produce arbitrary and artificial results. Such results are purely conventional and, therefore, involve no question of justice or injustice.

As respondent itself points out in its answers (Paragraph 10th), it is the customary practice for shipowners to supplement their hull insurance by insurance against total loss only. As we have shown above, by this ingenious method of placing his insurance the shipowner obtains, at a greatly reduced price, the same complete protection which he would have in a case where all his insurance was on the full form including particular average. Obviously this system works to the advantage of the shipowner and to the disadvantage of the hull underwriter, from the standpoint of losses as well as premiums, owing to the well settled rule that the hull underwriters pay the vessel's repair bills in full notwithstanding the fact that the actual value of the vessel greatly exceeds the agreed value.

As an original proposition, hull underwriters might argue with a good deal of force that it was unjust for them to pay a repair bill of $75,000 on a vessel valued at $100,000, but actually worth $500,000. They could

point out, with perfect justice, that if the vessel had been worth only $100,000, the repair bill would have been very much less. Such an argument, however, would be without merit, because the liability of the underwriters flows from an arbitrary arrangement to which they are parties, and which they are presumed to understand when they enter into it. Under these circumstances, it is idle to talk about abstract principles of justice and equity. Indeed, in the present case, the recognized rule of adjustment is stated in the policies (Exhibits 6, 7 and 8) as follows:

> "This insurance is fully to indemnify the assured for any and all charges and expenses applicable to the vessel in respect of the perils insured hereunder, irrespective of the value of the vessel, and this policy shall pay its share of such charges and expenses in the proportion which the amount hereby insured bears to the value as declared herein."

The custom and usage above mentioned are equally binding on the shipowner. The usual practice, as the answers point out, is for the shipowner to protect himself by taking out policies against total loss only, without benefit of salvage, in respect of that part of the actual value in excess of the value agreed in the hull policies. In the present case, although the respondent followed this practice, it did not carry it far enough to keep pace with the enormously increased value of the ship owing to war conditions. This, however, does not affect the general practice or the principle involved.

Leaving out the extraordinary circumstances of the present case, the Court can readily ascertain from the record the usual practice in these matters. The underwriters who insure against total loss only are well aware that they are not to share in any recoveries, and this understanding is ordinarily expressed in the policy (as it was in this case) by inserting a provision that

it shall be "without benefit of salvage" (*supra,* p. 34). If there is any recovery, it goes to the hull underwriters; and the shipowner, if not fully compensated by the hull insurance, looks to the total loss insurance for compensation in respect of the excess value. No question of justice or equity arises; the whole matter is governed by settled custom. Everyone recognizes and concedes that the hull underwriters occupy a preferred position in the matter of recovery from third parties.

There is nothing new about the practice above mentioned. Thirty-eight years ago Judge Addison Brown referred to

> "the well-known practice of insuring against a total loss only a variety of different interests under the name of 'disbursements';—an interest so different, as to have no share in salvage on total constructive loss."

In dealing with this subject, Judge Brown went on to say:

> "The description of the subject insured, namely, 'disbursements,' it cannot be doubted, was deliberately chosen to signify a wholly different risk from that upon 'hull, machinery and equipment,' and in order to distinguish the two as wholly different classes of insurance."
>
> *International Navigation Co.* v. *Atlantic Mutual Insurance Co.,* 100 Fed. Rep. 304, at page 307.

As Judge Brown recognized, the entire system of insuring against total loss only was arranged with a view to avoiding any conflict between the two classes of insurance. This could only be done by selecting for the interest insured against total loss only, some designation which would clearly indicate that the

total loss only insurance was not to contribute with the hull insurance in the event of loss or share with it in the event of recovery. The fiction is that the total loss only insurance is not on the hull at all; but the actual fact is, of course, as stated in the defendant's answers in these cases, *i. e.* that insurance against total loss only is taken out on P. P. I. conditions to cover the actual value of the vessel in excess of the insured value fixed in the hull policies. Great ingenuity has been used to keep the two sets of insurance separate and guard against any claim that the total loss only insurers are entitled to share in any salvage or recovery.

The present case can be better understood by considering what would happen in a case which was not complicated by the very sudden rise in values which occurred here due to war conditions. Suppose that a shipowner has a vessel worth half a million dollars; he insures $400,000 under full hull covers in which the vessel is valued at that sum; and $100,000 under policies which are against total loss only and without benefit of salvage. His vessel is sunk in collision with another vessel, the latter being solely at fault. The assured collects half a million dollars under his policies and then collects half a million dollars from the *tort feasor,* incurring legal and other expenses of $100,000. He now has in hand $900,000 as against an actual loss of $500,000. The total loss only underwriters are admittedly not entitled to share in the recovery. On the respondent's theory, the assured would only be called upon to return to the hull underwriters $320,000—*i. e.,* the amount of their payment less their share (4/5ths) of the legal expenses. Accordingly, the assured would make a clear profit out of the loss of his vessel in the sum of $80,000 over and above the half million dollars which the vessel was worth. As the contract of insurance is a contract

of indemnity the assured certainly would not be entitled to any such profit.

The only distinction between the case above put and the present case is that in the present case the amount of P. P. I. insurance taken out by the respondent was not sufficient to cover the difference between the insured value and the actual value. We submit, however, that the effect of the valuation clause in the policies issued by these petitioners cannot be dependent upon the amounts insured under other independent contracts, with which these petitioners have nothing to do. The hull policies gave the respondent permission to take out as much P. P. I. insurance as it saw fit, and the question whether it took out much or little can have no bearing on the interpretation of the hull policies. Moreover, even in the present case, the respondent pocketed a very substantial "windfall" over and above the full amount of its loss (*supra*, p. 6).

CONCLUSION.

Because the decision below determines an important question of marine insurance law contrary to the rule as stated by this Court and heretofore uniformly recognized and applied in this and other Circuits as well as in England, and changes a rule of law which has been relied upon for many years by shipowners and underwriters throughout the world, we submit that a writ of certiorari should be issued in order that the question may be reviewed and definitely settled by this Court.

Respectfully submitted,

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APPENDIX A.

(Extract from p. 4 of Exhibit 9)

Some of the English Underwriters on hull inquired as to the basis of the apportionment of the expenses and costs, and some of the P. P. I. underwriters inquired, in view of the large amount recovered, whether the owners would be willing to compensate the P. P. I. underwriters by making them some equitable refund. In respect to the first inquiry the lawyers' opinion was requested, and it has been agreed that on the basis of the Underwriters' receiving the sum insured by them and the owners the excess of the recovery over and above that amount, that all expenses and costs incurred should be divided one-fifth to hull underwriters and four-fifths to the owners. The second inquiry was placed before the owners, who gave it favorable consideration and decided to refund all the P. P. I. underwriters 50% of the face of their policies less the same percentage of expenses and costs as is paid by the owners. All the points raised by the English Underwriters were thereby resolved to the mutual satisfaction of themselves and the Owners.

NOTE: *The plaintiffs were not parties to the agreement mentioned above* (R., pp. 62-3, fols. 186-7; p. 77, fol. 229; p. 79, fol. 237; p. 86, fol. 256; p. 88, fol. 264).

APPENDIX B.

A comparison of the sums insured by the English underwriters on vessel (English hull underwriters) with the sums insured by the English P. P. I. underwriters (Exhibit 13, R., p. 99) shows that English hull underwriters who insured £54,851 of the total English hull insurance of £61,305 (R., p. 97), also insured £43,690 (R., p. 99) of the total P. P. I. insurance amounting to £65,105 (R., p. 97, fol. 290). In other words, approximately 90% in amount of the English hull insurance, in addition to receiving as hull underwriters the same proportion of the recovery as was received by the American underwriters, also received about ⅔rds of the gift to the P. P. I. underwriters (R., p. 99, fol. 296).

The English hull underwriters as a whole, insuring a total of £61,305, received as hull underwriters a recovery of £61,248.7.6 less charges of £6,984.6.9 (Exhibit 9, p. 50), or a net recovery of £54,264.0.9; and as P. P. I. underwriters, they received a net recovery of £17,396.3.2 (43,690/65,105ths of £25,923.0.6, R., fol. 296, Exhibit 9, pp. 51, 52), making a total net recovery of £71,660.3.11: which is almost 117% of the total sum of £61,305 insured by all the English hull underwriters.

However, the English underwriters who insured £54,851, or about 90% of the hull insurance placed in the English market (R., p. 99, fol. 296), received net as hull underwriters £48,551.5.8 (54,851/61,305ths of £54,264.0.9), and as P. P. I. underwriters £17,396.3.2 (*supra*), making a total net recovery of £65,947.8.10, which is about 120% of the £54,851 paid by them as hull underwriters (R., p. 99, fol. 297).

A comparison of this 120% recovery received by 90% of the English hull underwriters, with the approximately 89% recovery received by the American hull underwriters, throws considerable light on the attitude of the English hull underwriters, about which the defendant cross-examined Mr. Grant at the trial (R., pp. 52-55).